No. 93-1456 & 93-1828

In The

Supreme Court of the United States

October Term, 1994

U.S. TERM LIMITS, et al.,

Petitioners,

v.

RAY THORNTON, et al.,

Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT, Attorney General of the State of Arkansas,

Petitioner,

v.

BOBBIE E. HILL, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION, THE WYOMING CITIZENS FOR RESPONSIBLE GOVERNMENT, THE SOUTH DAKOTANS FOR TERM LIMITS, THE MONTANANS FOR LIMITED TERMS, NEW MEXICANS FOR TERM LIMITS, ARIZONA CITIZENS FOR LIMITED TERMS, and AMERICANS BACK IN CHARGE IN SUPPORT OF U.S. TERM LIMITS, INC.

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Mountain States Legal Foundation, the Wyoming Citizens For Responsible Government, the South Dakotans For Term Limits, the Montanans For Term Limits, New Mexicans For Term Limits, Arizona Citizens For Limited Terms, and Americans Back In Charge in Colorado, by

and through their counsel, respectfully submit this brief *amici curiae*, pursuant to Supreme Court Rule 37, in support of petitioner U.S. Term Limits, Inc.[1].

IDENTITIES AND INTERESTS OF AMICI

Mountain States Legal Foundation ("MSLF") is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, a limited and accountable government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state in the Union. A large number of MSLF's members live in western states in which citizens have actively worked for term limits, including Colorado, which was the first state to pass a constitutional amendment limiting terms in 1990.

The Wyoming Citizens For Responsible Government, the South Dakotans For Term Limits, the Montanans For Term Limits, New Mexicans For Term Limits, Arizona Citizens For Limited Terms, and Americans Back In Charge in Colorado are independent grassroots organizations dedicated to passing and preserving term limits initiatives in their respective states.

Amici's interests in the outcome of this lawsuit are directly tied to their members' interests in ensuring truly representative government. *Amici* believe that the ruling of the Arkansas Supreme Court does violence to the most basic principle underlying our constitutional system, popular sovereignty.

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[1] *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

SUMMARY OF ARGUMENT

The people of Arkansas are authorized to enact Amendment 73, the challenged term limit, pursuant to Article I, § 2 and the Seventeenth Amendment of the U.S. Constitution. Because Amendment 73, Arkansas' term limit, was enacted through a plebiscite by a majority vote of the people of Arkansas, it constitutes a decision by the people pursuant to Article I, § 2 and the Seventeenth Amendment as to who shall represent the Arkansas electorate in Congress.

Regardless of whether Amendment 73 constitutes a regulation of the "manner" of elections under Article I, § 4, it is itself an election in which the electorate determined that certain sorts of incumbent federal legislators should no longer serve in Congress. This decision is expressly delegated to the electorate of Arkansas by Article I, § 2, clause 1, and the Seventeenth Amendment.

The qualifications contained in Article I do not bar the people of Arkansas from exercising their delegated power to choose who will represent them in Congress. The Arkansas Supreme Court cited various authorities for the proposition that the qualifications contained in Article I are exclusive of all others.

At most, however, these authorities suggest that government officials – state or federal legislatures – lack power to restrict the range of candidates available for consideration by the electorate.[2] This principle of popular

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[2] Of course, none of these authorities cast any doubt on the power of both the state legislatures and Congress to regulate the "time, place, and manner" of elections pursuant to Article I, § 4. To the extent that this Court finds that Amendment 73 is such a regulation of the "manner" of regulations, this Court can reverse the decision of the Arkansas Supreme Court without addressing the arguments presented by *amici*. However, if this

sovereignty does not invalidate Amendment 73, because Amendment 73 was directly enacted by a popular vote of the people of Arkansas. Amendment 73 does not interfere with the electorate's powers to choose senators and representatives: it constitutes the exercise of those powers.

Candidate qualifications also need not be uniform throughout the nation in order for them to be "fixed" as desired by the framers. The framers treated voter and candidate qualifications similarly: both were sufficiently "defined and fixed" if they were defined in state constitutions and unalterable by Congress and the state legislatures.

Finally, Arkansas' limit on federal legislative terms does not unconstitutionally interfere with the power of the electorate freely to choose Federal legislators. First, while it is true that the term limit impedes the ability of long-term incumbents to be re-elected, the term limit facilitates the ability of challengers to be elected. Given that Congress bestows significant advantages on long-term incumbent legislators, Arkansas' term limit may actually increase the choices available to the electorate, by preventing the government-conferred advantages of incumbency from practically excluding viable challenges to long-term incumbents.

Second, the term limit enacted by Arkansas voters in 1992 can be repealed by a simple majority of Arkansas voters. If future electorates in Arkansas wish to elect incumbents excluded by Arkansas' term limit, they need only repeal that term limit in the same way that it was enacted – by a popular vote in a plebiscite. Thus, no

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Court accepts *amici*'s argument that Amendment 73 is authorized by Article I, § 2 and the Seventeenth Amendment, then the Court need not reach the issue of whether Amendment 73 is a valid regulation of the "manner" of elections pursuant to Article I, § 4.

present majority of voters has "alienated" the power to elect legislators by making some irreversible decision to exclude long-term incumbents. Rather, the Arkansas electorate simply reversed the congressionally created presumption that incumbents should generally prevail over challengers.

ARGUMENT

I. The people of Arkansas have authority under Article I, § 2 and the Seventeenth Amendment to limit the terms of federal representatives and senators.

Article I, § 2 of the U.S. Constitution provides that U.S. representatives shall "be chosen . . . by the People of the several States." The Seventeenth Amendment likewise provides that senators "from each State" shall be "elected by the people thereof." Therefore, the national people, through the U.S. Constitution, have delegated the power of choosing federal legislators to the people of the several states, including the people of Arkansas.

The issue is whether Amendment 73, Arkansas' term limit for federal legislators, constitutes a permissible exercise of this power to elect senators and representatives. The *amici* submit that the popular approval of Amendment 73 constituted a choice of federal legislators authorized by Article I, § 2 and the Seventeenth Amendment. In determining whether Arkansas' term limit is authorized by Article I, § 2 and the Seventeenth Amendment, it is crucial to note that Amendment 73 was approved by a majority of Arkansas voters in a plebiscite amending the state constitution. This plebiscite constituted a popular election in which the voters determined whether they wished to be represented by incumbents who have served three terms in the House of Representatives or two terms in the Senate.

By enacting Amendment 73, the people of Arkansas essentially voted against such incumbents and voted in favor of candidates who had not served for the specified period in the Congress. The enactment of Amendment 73, in other words, is analogous to a party primary, a preliminary vote in which voters determine which candidates should be eligible for further consideration on the ballot in the general election.[3]

Nothing in Article I, § 2 or the Seventeenth Amendment excludes this method of rejecting candidates for federal legislative office. Of course, the popular enactment of Amendment 73 differs from the normal election of federal legislators, because Arkansas voters did not vote on specified individual candidates listed separately on a ballot. Rather, by enacting Amendment 73, Arkansas voters voted against an entire *class* of candidates – incumbent senators who had served for two terms and incumbent representatives who had served for three terms.

But Article I, § 2 and the Seventeenth Amendment nowhere require that voters choose Senators and representatives by voting for individual candidates listed on a ballot. Article I, § 2 and the Seventeenth Amendment state only that representatives and senators shall be "chosen" or "elected" by the people of the several states. There is no constitutional requirement that the electorate vote on individual candidates as opposed to general classes of candidates. Moreover, there can be no dispute that election systems, such as "list" systems, in which the electorate votes for general classes of candidates rather

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[3] *See* Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 107-110 (1991).

than individual candidates, can be fair and democratic methods of registering public opinion.[4]

The popular ratification of Amendment 73 is analogous to an election under such a "list" system of electing legislators: the Arkansas electorate voted against one general class of candidate (the specified sort of incumbent federal legislator) in favor of another class of candidate (the class of candidates who lack the specified type of incumbency). Such a decision by the people of Arkansas to reject one class of candidates in favor of another is an election authorized by the plain language of Article I, § 2 and the Seventeenth Amendment.

To understand how the power to choose senators and representatives implies the power to impose additional qualifications for senators and representatives, it is instructive to review the method by which many state legislatures selected senators prior to the ratification of the Seventeenth Amendment. In 1901, Oregon adopted a system under which state legislators would pledge to cast their vote only for those candidates for the U.S. Senate who had won a majority of the popular vote in a statewide election. By law, the state legislature would be presented with the names of the two persons who had

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[4] List systems generally provide the voters with lists or "slates" of candidates belonging to different political parties. The lists are compiled by the political parties. In some list systems, the voters do not vote on individual candidates but rather vote for or against the entire party slate. The parties receive the same proportion of seats in the legislature as they received votes in the election. *See generally* Enid Lakeman, How Democracies Vote: A Study in Majority and Proportional Electoral Systems 98, 168-214 (1955). At least one commentator has noted that limits on legislative terms can serve purposes analogous to such "list" systems of election. *See* Andrew R. Dick & John R. Lott, Jr., *Reconciling Voters' Behavior with Legislative Term Limits*, 50 J. of Pub. Econ. 1, 12 (1993).

won this popular vote and thereby been nominated by the electorate. The state legislature, composed of persons who had pledged to vote for the popularly elected candidate, would then approve these two names and send them to the U.S. Senate.[5]

Several, mostly Western, states adopted the "Oregon system" of electing senators. As commentators have noted, this system of election effectively transformed the method of senatorial election from indirect election by the state legislatures into direct election by the voters. In purpose and effect, the state legislatures that had adopted the Oregon system added a qualification for election to the U.S. Senate: they disqualified all candidates that had not won a majority of votes cast in a state-wide popular election.[6] Although popular election was nowhere mentioned as a qualification for U.S. Senators until the ratification of the Seventeenth Amendment in 1913, the state legislatures had the power to impose this additional qualification for office pursuant to Article I, § 3, which delegated plenary power to choose U.S. senators to the state legislatures.

Like the state legislatures prior to the ratification of the Seventeenth Amendment, the people of the several states have plenary power to select members of Congress. There is no limit on their power to disqualify candidates by popular vote: indeed, it is the duty of the people of the several states to determine whether candidates are qualified to serve in Congress. Just as the State legislatures

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[5] *See* George H. Haynes, The Senate of the United States: Its History and Practice 101-102 (1938) (describing "Oregon system" of electing senators); Allan P. Grimes, Democracy and the Amendments to the Constitution 76 (1978).

[6] *See* Haynes, The Senate of the United States at 104.

could add qualifications for U.S. Senators by disqualifying all candidates who had not won a popular election, so too, the people of the several states can disqualify classes of incumbents. In either case, the entity to which the U.S. Constitution delegates power to select members of Congress (the state legislatures or the people of the several states) are simply exercising their delegated power to select congresspersons.[7]

II. The qualifications contained in Article I do not bar the people of Arkansas from limiting the terms of their federal representatives and senators.

The Arkansas Supreme Court held that Amendment 73 "is violative of the respective Qualification clauses of Article I of the U.S. Constitution." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 263, 872 S.W.2d 349, 355 (1993). According to the court, the three qualifications enumerated in Article I, § 2 of the U.S. Constitution – age, citizenship, and residency – were intended to exclude all others in order to insure "uniformity in qualifications." *U.S. Term Limits, Inc.*, 316 Ark. at 265, 872 S.W.2d at 356. In reaching this holding, the court relied heavily on this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969) and on two historical sources cited in *Powell* – a passage from Hamilton's *Federalist No. 60* and the 1807 debates in the Tenth Congress over whether Representative-elect William McCreery should be permitted to take his seat in the House of Representatives.

The Arkansas Supreme Court mistakenly held that the history of Article I and the case law construing it stands for a fundamental principle of "uniformity" for "representation of the various states in Congress."

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[7] *See* Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 108-109.

Assuming *arguendo* that the qualifications contained in Article I preempt additional qualifications, such preemption occurs only to the extent that the additional qualifications are imposed on the electorate *without the electorates' consent.*

As explained in more detail below, this principle of popular sovereignty is not violated by Amendment 73, because Amendment 73 was enacted by a popular vote of the electorate. Amendment 73 does not restrict the voters' choice of candidates without their consent. Rather, Amendment 73 itself *is* the electorate's choice of candidates: in the words of the *Powell* Court, Amendment 73 is itself the exercise of the right of the people of Arkansas to " 'choose whom they please to govern them.' " *Powell*, 395 U.S. at 547. Therefore, the Arkansas Supreme Court erred in finding that Amendment 73 was preempted by the qualifications already contained in Article I.

A. The qualifications contained in Article I preempt additional qualifications only to the extent that such additional qualifications are imposed without the consent of the electorate.

According to some commentators, the qualifications contained in Article I preempt all other qualifications for congresspersons.[8] Of course, to the extent that "qualifications" for congressional office are simply regulations of the "manner" of elections, they are not preempted by Article I but rather are explicitly authorized by Article I, § 4.[9]

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[8] *See, e.g.*, Troy Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Den. U.L. Rev. 1 (1992).

[9] In the interests of preserving space, *amici* rely entirely on the briefs of petitioner U.S. Term Limits, Inc. to explain how Amendment 73 is a permissible regulation of the "manner" of federal elections pursuant to Article I, § 4.

However, even assuming *arguendo* that Amendment 73 does not constitute a regulation of the "manner" of elections under Article I, § 4, it does not follow that it is preempted by the qualifications already contained in Article I. As explained by some of the drafters and ratifiers of the Constitution, some of the members of the Tenth Congress, and this Court in *Powell v. McCormack*, 395 U.S. 486 (1969), Article I preempts additional qualifications only in order to protect the electorate from unauthorized restrictions on the electorate's power under Article I to choose members of Congress. Where the electorate itself disqualifies candidates for Congress, this principle of popular sovereignty is not violated, because the disqualification is itself the exercise of the electorate's discretion that Article I protects.

1. The principle of popular sovereignty in remarks of the framers and ratifiers of the U.S. Constitution concerning qualifications for Congress.

As this Court noted in *Powell v. McCormack*, some delegates to the Philadelphia Convention and to the state ratifying conventions argued against imposing qualifications for Congress additional to those few qualifications contained in Article I. *Powell*, 395 U.S. at 540-42. All of these historical arguments against additional qualifications, however, were based on the theory of popular sovereignty – the principle that the discretion of the electorate to choose its congressional delegation should be as unrestricted as possible. As Hamilton stated,

> the true principle of a republic is, that the people should choose whom they please to govern

> them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.

Powell, 395 U.S. at 541 (quoting Hamilton's remarks in the New York ratifying convention).[10]

As the *Powell* Court also noted, the framers were greatly influenced by the controversy over Parliament's exclusion of John Wilkes, a controversy in which the House of Commons barred Wilkes from taking his seat three times, despite his overwhelming popularity with his constituency. *Powell*, 395 U.S. at 527-530. To prevent Congress from similarly disregarding the wishes of the local electorate, the framers installed "standing qualifications" limiting Congress' discretion to bar elected candidates from taking their seats.

Again, the limitation on Congress' ability to disqualify candidates for federal legislative office is not rooted in a desire for uniformity of qualifications but rather in the principle that the electorate should have broad discretion to choose its own representatives: the framers "did not think that the elected had any right in any case to narrow the privileges of the electors."[11]

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[10] *See also* 2 The Records of the Federal Convention of 1787 250 (Max Farrand ed., rev. ed. 1966) (remarks of James Madison); *Powell*, 395 U.S. at 541 & n.76 (quoting speeches by Robert Livingstone and Wilson Carey Nicholas); 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 298 (Jonathan Elliot ed., reprint 1987) (1896) (speech of Richard Harrison in Virginia ratifying convention denouncing mandatory rotation because it would exclude from Congress persons "in whom the confidence of the legislature and the love of the people are united").

[11] 2 Records of the Federal Convention of 1787, at 205 (remarks of Benjamin Franklin).

2. The principle of popular sovereignty in *Powell v. McCormack*

This fear that Congress might deprive the state electorates of their power to choose their own representatives has persisted throughout the history of the United States.[12] The House of Representative's attempt to exclude Adam Clayton Powell indicates the most recent instance in which Congress has improperly tried to restrict the powers of the electorate to choose their own representatives. In *Powell*, this Court held that the House of Representatives could not exclude Adam Clayton Powell from the House by a simple majority vote pursuant to its powers under Article I, § 5 to judge the qualifications of its members. In dicta, the Court noted that the exclusion of Powell violated "[a] fundamental principle of our representative democracy" that "'the people should choose whom they please to govern them.'" *Powell*, 395 U.S. at 547 (quoting Hamilton).

To the extent that *Powell*'s dicta went beyond the narrow holding concerning the powers of the House of Representatives under Article I, § 5, this dicta relied on a principle of popular sovereignty, not a principle that qualifications had to be uniform across the nation. The *Powell* Court simply asserted that the electorate had been delegated the power to choose representatives by Article I and that Congress could not limit this power by excluding candidates elected by the majority of the electorate.

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[12] *See, e.g.*, James M. Beck, The Vanishing Rights of the States 52 (1926) (decrying Senate Committee's investigation into Senator-elect Vare's right to take his seat as invasion of local prerogative of election).

3. The principle of popular sovereignty in the debates concerning the seating of William McCreery

The Arkansas Supreme Court relied on the Tenth Congress' 1807 decision to seat William McCreery and ignore Maryland's statute requiring U.S. representatives from Baltimore County to reside in the City of Baltimore. According to the court, these debates indicate that qualifications must be uniform throughout the nation. *U.S. Term Limits, Inc.*, 316 Ark. at 265, 872 S.W.2d at 356.

However, the Arkansas Supreme Court misread the import of the McCreery case in two ways. First, it is not the case that the Committee Report issued any opinion concerning the constitutionality of Maryland's additional residency requirement. In fact, the report deliberately refrained from expressing any such opinion.[13]

Second, assuming *arguendo* that the remarks of individual congresspersons can be construed to stand for any broad proposition concerning the constitutionality of additional qualifications, the principle adopted by these individual congresspersons was not uniformity of qualifications but protection of popular sovereignty. Maryland's additional residency requirement had been approved only by the Maryland legislature and not by the people of Maryland: the residency requirement was contained in an ordinary statute, not in an amendment to the state constitution.

This fact did not go unnoticed by those who spoke in support of McCreery. For instance, Representative Johnson explicitly stated that the Maryland legislature could not add qualifications but that the people of Maryland *could* add such qualifications:

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[13] *See* Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 124.

> The question was whether any State Legislature, or any other power of legislation, could add qualifications to any member of that House. He laid it down as a principle that every contraction of qualifications for Representatives was an abridgment of the liberty of the citizen. The power of adding other qualifications than those fixed by the constitution, would, in his opinion, be a breach of the right of suffrage. . . . he was not satisfied that any Legislature of the Union had a discretion under the constitution to legislate on these important principles; *he thought that discretion rested only with a convention of the people . . . Would any power less than a convention of the State of Maryland assume the right of adding a disqualification?*

Digest of Contested Election Cases 171 (M. St. Clair & David A. Hall eds., 1834) (Case XXVI: *Barney v. McCreery*) (emphasis added).

The principle that emerges from Johnson's speech, as well as the speeches of other representatives, is that the Maryland legislature could not add qualifications because disqualifying candidates was the exclusive prerogative of the people and could only be imposed by the "people in convention."[14] As Johnson stated, "[t]here was a great distinction between the power of the people in convention, and the power of the legislature growing out of a constitution, which the people entered into in their sovereign capacity."[15]

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[14] Digest of Contested Election Cases, at 194.

[15] *Id. See also* Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 123-28; Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, 892-97 (1993).

Representative Johnson's distinction between state legislatures and the electorate reflects the familiar but fundamental distinction drawn by the framers between direct elections by the electorate – "the people" – and indirect elections by legislative bodies. The central debate in the Philadelphia convention concerned whether Congress should be chosen immediately by the people or mediately by the state legislatures.[16] A central issue in this debate was whether election directly by the people would result in a more democratic and popularly responsive House of Representatives. In adopting direct elections, the framers signified their distrust of state legislatures and desire for a more popularly accountable method of election.[17]

Thus, Representative Johnson's remarks in the debates concerning the seating of McCreery reflect deep concerns of popular sovereignty incorporated into Article I. Like the framers, Representative Johnson and others wished to preserve direct elections by the people of the several states from any encroachment by the state legislatures. The debates surrounding the seating of William McCreery involved this fundamental principles of popular sovereignty more than it involved concerns about uniformity of qualifications.

In summary, one can assume *arguendo* that the U.S. Constitution limits the ability to disqualify candidates for

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[16] *See generally Forrest McDonald*, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 228-240 (1985).

[17] James Wilson vigorously argued in favor of direct elections precisely because the state legislatures might be "actuated by . . . an official sentiment opposed to that of the Genl: Govt. *and perhaps to that of the people themselves.*" 1 Records of the Federal Convention of 1787, at 359 (Max Farrand ed., rev. ed. 1966) (emphasis added).

federal office. However, it is crucially important to understand the purpose served by this limitation: the framers wished to give the people of the several states the widest possible discretion in electing their representatives, because "[t]o dictate and control them, to tell them whom they shall not elect is to abridge their natural rights."[18] The issue in this case is whether this principle should result in the invalidation of Amendment 73.

B. Because Amendment 73 was enacted by a popular vote of the Arkansas electorate, it is not preempted by the qualifications contained in Article I.

Amendment 73 was enacted through a ballot initiative by a majority of the electorate in Arkansas. For this reason, the principle of popular sovereignty described above has no application to Amendment 73. Far from being an interference with the power of the people of the several states to choose representatives, Amendment 73 itself constitutes a choice by the Arkansas electorate concerning who should represent them.

In most instances, the fact that a challenged law is enacted by a popular majority through a plebiscitary process has no bearing on its constitutionality. *Lucas v. Colorado General Assembly*, 377 U.S. 713, 737 (1964). However, as explained above, the only reason that the qualifications contained in Article I preempt additional qualifications is that such additional qualifications interfere with the prerogative of the state electorates to choose whom they please to represent them. Article I and the

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[18] 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution at 320 (remarks of Robert Livingstone in New York ratifying convention).

Seventeenth Amendment delegate the duty of choosing members of Congress to the people of the several states. Therefore, unless a disqualification of candidates for Congress is a valid regulation of the manner of elections under Article I, § 4, neither the state legislatures nor Congress can disqualify candidates for federal legislative office.

This principle is inapplicable to Amendment 73, because the electorate of Arkansas has authority to choose representatives and senators. Therefore, it is not barred by Article I from adding qualifications that exclude candidates for these positions: unlike Congress or the state legislatures, such *popular* disqualification of candidates does not interfere with a power that is delegated to another entity by the U.S. Constitution. By eliminating a class of candidates from consideration, the electorate simply exercises its delegated powers under Article I and the Seventeenth Amendment.

III. Amendment 73 does not violate any requirement that qualifications for federal legislative office be "defined and fixed."

The Arkansas Supreme Court quoted Alexander Hamilton's statement in *Federalist No. 60* that qualifications must be "defined and fixed" to support the contention that qualifications for Congress must be uniform and cannot vary from state to state. *U.S. Term Limits, Inc.*, 316 Ark. at 264-65, 872 S.W.2d at 356. However, the court misconstrued the import of Hamilton's statement. Hamilton's statement actually indicates that qualifications for Congress were "fixed" in precisely the same way as qualifications for voters: in both cases, qualifications were fixed by the *state* constitutions as approved by the people of the several states.

To understand Hamilton's meaning, it is important to note that Hamilton was referring both to qualifications for elected officials *and* to qualifications for electors. According to Hamilton, "[t]he qualifications of the persons *who may choose or be chosen* . . . are defined and fixed in the Constitution and are unalterable by the legislature." Alexander Hamilton, *Federalist No. 60*, in The Federalist Papers 371 (Clinton Rossiter ed. 1961) (emphasis added).

The qualifications of "the persons who may choose" – the voters – are, of course, nowhere given any uniform definition by the U.S. Constitution. Rather, Article I, § 2 of the U.S. Constitution simply states that voters "shall have the Qualifications requisite for the most numerous branch of the State Legislatures." Therefore, by stating that qualifications for congresspersons are "defined and fixed" by the U.S. Constitution, Hamilton cannot mean that these qualifications are uniform throughout the United States: such an interpretation of the phrase "fixed and defined" would make nonsense of Hamilton's reference to the qualifications for voters contained in the same sentence.[19]

Rather, Hamilton is arguing that qualifications for both congresspersons and voters are sufficiently defined and fixed if they are established by any manner that is "unalterable by the legislature" – meaning Congress. Hamilton's argument is based not on uniformity but on

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[19] *See* Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 106 & n.33; Donald Lutz, The Origins of American Constitutionalism 162 (1988) ("[t]he Founders seem to be telling us that some things about elections were not crucial to the operation of the Constitution, such as the characteristics of voters *and of those who run for office*").

popular sovereignty: taken in context, Hamilton's argument is that Congress cannot change candidate or voter qualifications to advantage a wealthy or well-born minority. It hardly follows from this statement that the voters themselves could not change candidate qualifications through an amendment of their state constitutions.[20]

Therefore, Hamilton's statement actually indicates that Amendment 73 properly defines and fixes qualifications for congresspersons. Amendment 73 was approved by a majority of the voters as an amendment to the constitution of the State of Arkansas. Such an amendment is "defined and fixed" in that it is "unalterable" by either state or federal legislators. Because Amendment 73 involves no congressional interference with suffrage or candidacy, it is consistent with the letter of Article I and with the spirit of popular sovereignty that animates Article I.

IV. Amendment 73 does not reduce the choices available to future electorates in Arkansas, because, by eliminating government-conferred advantages of incumbency, Amendment 73 increases the availability of viable challengers who would otherwise be excluded.

Several commentators have expressed concern that, by enacting Amendment 73, a temporary majority of

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[20] This interpretation of Hamilton's argument is supported by Madison's remarks in *Federalist No. 52*. Madison notes that, because "the right of suffrage is . . . a fundamental article of republican government," the U.S. Constitution had to "define and establish" qualifications for electors. James Madison, *Federalist No. 52*, in The Federalist Papers 326 (Clinton Rossiter ed. 1961). According to Madison, these qualifications are sufficiently defined because they are defined in the states' constitutions and cannot be altered by state or federal legislators.

Arkansas voters have deprived future electorates in Arkansas of the power to choose incumbents.[21] According to this criticism, term limit measures like Amendment 73 violate the principle of popular sovereignty implicit in *Powell* because they allow present electorates to foreclose options that future electorates might wish to adopt.

Given that both Article I, § 2 and the Seventeenth Amendment require periodic elections, this criticism is a legitimate source of concern. A temporary majority of voters ought not to be able to exclude future majorities from choosing freely their own representatives. However, on proper analysis, this concern is misplaced, for two reasons.

First, the Arkansas electorate has not barred future majorities from repealing Amendment 73: the measure can be repealed through a simple majority vote. Therefore, no permanent exclusion of incumbents has been imposed on future electorates, and any future electorate can exercise its power under Article I, § 2 and the Seventeenth Amendment to choose incumbent legislators simply by voting to repeal Amendment 73.

Second, Amendment 73 actually eliminates one obstacle to competitive elections and the presentation of a full range of candidates to the electorate: by excluding incumbents from the ballot, Amendment 73 prevents incumbents from using government-conferred resources to eliminate viable challengers to the incumbents. As explained below, by counteracting some of the government-conferred benefits of incumbency, Amendment 73 is just as likely to increase choices available to future electorates as contract them.

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[21] *See, e.g.*, Jonathan Mansfield, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 Cornell L. Rev. 966 (1993).

A. Government-conferred benefits of incumbency prevent future electorates from electing non-incumbent candidates.

It is widely recognized by political scientists that incumbent congresspersons generally defeat challengers.[22] Indeed, incumbents have been re-elected to the House of Representatives on average about 90% of the time since the end of World War II,[23] and Senators have been re-elected roughly 70% of the time since direct elections began in 1913.[24] In 1986, 98% of incumbents in the House of Representatives were re-elected.[25] Moreover, it is also widely recognized that,

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[22] The literature on the advantages of incumbency is enormous. For summaries, see Richard S. Beth, *Incumbency Advantage and Incumbency Resources: Recent Articles*, 9 Cong. & Presidency 119 (1984) and Richard S. Beth, *Recent Research on Incumbency Advantage in House Elections: Part II*, 11 Cong. & Presidency 211 (1984). *See also* Gary King, *Constituency Service and Incumbency Advantage*, 21 Brit. J. Pol. Sci. 119, 119 & n.1 (1991) (listing articles on incumbent advantage); Candice Nelson, *The Effect of Incumbency on Voting in Congressional Elections, 1964-1974*, 93 Pol. Sci. Q. 665 (1978).

[23] Morris Fiorina & David Rohde, *Richard Fenno's Research Agenda and the Study of Congress*, in Home Style and Washington Work: Studies of Congressional Politics 9 (Fiorina & Rohde eds. 1989); Thomas E. Mann, *Is the House of Representatives Unresponsive to Political Change?*, in Elections American Style 261 (A. James Reichley, ed. 1987).

[24] It is widely recognized that Senate elections are more competitive than House elections. *See, e.g.*, Morris Fiorina, Congress: Keystone of the Washington Establishment 115-118 (2d ed. 1989) [hereinafter Fiorina, Keystone]. However, senators still benefit from incumbency, *Id.* at 27-28, and they are re-elected roughly 70% of the time. *See* David C. Huckabee, Re-Election Rates of Senate Incumbents 1790-1988 (Cong. Research Serv.: Gov't Div. 1990).

[25] Thomas E. Mann, *Is the House of Representatives Unresponsive to Political Change?*, in Elections American Style at 261.

since the mid-1960s, incumbents have been prevailing over challengers by ever-widening margins of victory[26]: the margin by which incumbents defeated challengers increased by about 5% during the 1970s.[27]

If incumbent congressmen defeated challengers simply because the electorate preferred incumbency over inexperience, then the advantage enjoyed by incumbents would be a matter of no constitutional significance. However, the undisputed and widely recognized facts indicate that the advantage enjoyed by incumbents is not simply the result of incumbent popularity with the electorate.[28] Rather, incumbent advantage is created, at least in part, by the benefits conferred upon incumbents by Congress. Crucial among these advantages are the franking privilege, the use of staff to cultivate relations with the constituency, travel funds,

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[26] David Mayhew originally described how fewer incumbents were prevailing by low margins of victory in *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295 (1974). *See also* Fiorina, Keystone at 48-52 (describing nature and magnitude of incumbency effect).

[27] As Gary Jacobson has noted, it does not follow from the disappearance of close races and the increase of incumbent vote share that there is a lower rate of turnover in congressional elections. Because volatility of voting has also increased, incumbents in the House of Representatives win by larger margins but no more often than in the 1960s – that is, about 90% of the time. *See* Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives, 1952-1982*, 31 Am. J. Pol. Sci. 126 (1987). *See also* Stephen Ansolabehere, David Brady, & Morris Fiorina, *The Vanishing Marginals and Electoral Responsiveness*, 22 Brit. J. Pol. Sci. 21, 23-27 (1992) (describing and analyzing Jacobson's data and conclusions); Thomas Mann, *Is the House Unresponsive to Change?*, in Elections American Style at 264-66.

[28] *See* Fiorina, Keystone at 25-27.

offices in the incumbents' district, Congressional broadcast studios.[29]

According to Fiorina's influential analysis of Congress, with the decline of political parties, candidates have had to assemble resources to replace those resources that partisan organizations used to provide – money, publicity, local offices, and organizations, etc.[30] Incumbents have obtained these resources from Congress, which provides staff, local offices, travel funds, franking privileges, and other monetary resources to its members.[31] Challengers, however, do not receive such resources, and, as a result, they are systematically at a competitive disadvantage against incumbents.[32]

Congress has also made seniority into an asset for incumbents. Since the 1910 House revolt against House Speaker Joseph Cannon, Congress has increasingly emphasized seniority in making committee and subcommittee assignments.[33] The more senior members have greater

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[29] *See* Fiorina, Keystone at 53-63. Thomas Mann notes that incumbents succeeded in winning votes "largely by utilizing the increased resources at their disposal (staff, the franking privilege, travel funds, and House television and radio stations) to cultivate their districts." Thomas Mann, *Is the House Unresponsive to Change?*, in Elections American Style at 263-64. *See also* Albert Cover, *One Good Term Deserves Another: The Advantage of Incumbency in Congressional Elections*, 21 Am. J. Pol. Sci. 523 (1977). In 1975, the monetary value of these benefits was estimated to equal about $500,000. Herbert Alexander, Financing Politics: Money, Elections, and Political Reform 55 (1976).

[30] Fiorina, Keystone at 112-115.

[31] The operating budget for each member of the House of Representatives has doubled in the last ten years. Norman J. Ornstein, Thomas E. Mann, & Michael J. Malbin, Vital Statistics on Congress, 1989-1990 144 (1990).

[32] Fiorina, Keystone at 20.

[33] Nelson Polsby, *The Institutionalization of the House of Representatives*, 62 Am. Pol. Sci. Rev. 144, 156 (1968).

opportunities to occupy the most desirable subcommittee assignments – those assignments that most enable the incumbent to benefit his or her district through effective casework or through "pork barrel" spending – expenditures on specific projects located within the district. By voting for a challenger, constituents would, by definition, elect a representative without seniority. But, without such seniority, the representative would be less effective. In effect, Congress would "fine" the electorate for voting against an incumbent.[34]

Beyond these specific benefits for incumbents, evidence suggests that Congress deliberately structures legislation to increase demand in those services that incumbents can best supply: casework for constituents and district-specific spending measures. Rather than vote for legislation containing specific policy proposals, Congress creates agencies to administer vaguely defined programs under nebulous standards – programs that increase the opportunities for incumbents to engage in ombudsman services for constituents aggrieved by bureaucratic action. By intervening with the bureaucracy, the incumbent wins the gratitude of the constituent and provides "unsticking" services that challengers by definition cannot extend.[35]

Again, if demand for these ombudsman services were independent from Congressional action, they would not be problematic: incumbents are, after all, supposed to provide services demanded by constituents in a democratic system.

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[34] Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 144-45.

[35] Fiorina, Keystone, at 37-47; Bruce Cain, John Ferejohn, & Morris Fiorina, The Personal Vote: Constituency Service and Electoral Independence 123 (1987). For an attempt to verify the relation between constituency service and re-election, see Gary King, *Constituency Services and Incumbency Advantage*, 21 Brit. J. of Pol. Sci. 119 (1991).

However, research suggests that Congress deliberately increases the need for such services by enacting vague legislation in order to create larger opportunities for individual Congresspersons to intervene with bureaucracies on behalf of constituents.[36]

Voters are deprived of viable alternative candidates – of genuine electoral choices – by this system of incumbent protection. Viable candidates are frequently driven off by the resources at an incumbent congressperson's disposal. The challengers who run are often weak, underfunded, inexperienced, and poorly organized.[37]

In effect, Congress' efforts to insulate incumbents from electoral challenges are the mirror image of Congress' effort in *Powell* to exclude candidates elected by local constituents. In the former case, Congress excludes the candidates that the constituency prefers. In the latter case, Congress promotes the candidate – the incumbent – that the constituency might not prefer. In either case, Congress places its thumb on the

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[36] *See* Fiorina, Keystone at 37-47.

[37] For several accounts of the ability of incumbents to scare off serious challenges, see Thomas A. Kazee, *The Deterrent Effect of Incumbency on Recruitment in Congressional Elections*, 8 Legis. Stud. Q. 469, 478 (1983) (noting that "the battle for incumbent re-election is largely won – well before the campaign even begins" because viable challengers are discouraged by incumbents' perceived advantages); Fiorina, Keystone at 100-101; Lyn Ragsdale, *Incumbency Popularity, Challenger Invisibility, and Congressional Voters*, 6 Legis. Stud. Q. 201, 209-10 (1981) (noting that "most voters do not perceive a contest between incumbents and challengers in House races"); Barbara Hinckley, *The American Voter in Congressional Elections*, 74 Am. Pol. Sci. Rev. 641, 643 (1980); Gary Jacobson, *Incumbents' Advantages in the 1978 U.S. Congressional Elections*, 6 Legis. Stud. Q. 183, 198 (1981); Thomas E. Mann & Raymond Wolfinger, *Candidates and Parties in Congressional Elections*, in Controversies in Voting Behavior 290 (Richard Niemi & Herbert Weisberg eds. 1984).

scale of the electoral process and prevents elections from being an accurate measure of public opinion.[38]

By enacting Amendment 73, Arkansas voters have attempted to neutralize some of the government-conferred benefits of incumbency and allow future electorates to have the option of electing viable candidates who are not incumbent legislators. Prior to 1910, voters routinely imposed "rotation" – term limits – on federal legislators simply by voting against incumbents who had served for long periods of time.[39] However, where incumbents enjoy government-conferred benefits and can eliminate or drown out effective and viable challengers, this method of rejecting incumbents is simply not practical: the incumbents' advantages create a paucity of tolerable or effective alternatives to the incumbent legislator.

Therefore, Amendment 73 cannot be found unconstitutional on the ground that it limits the choices available to future electorates. It is true that Amendment 73 affects future electorates by making it more difficult to re-elect incumbents. However, the decision by voters to re-elect an incumbent also affects future electorates, because such a decision bestows government resources on the incumbent and allows the incumbent to drive away effective challengers. In either

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[38] *See* Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. at 145.

[39] *See, e.g.*, Michael Ostrogorski, Democracy and the Party System in the United States: A Study in Extra-Constitutional Government 129 (1912) (noting that "[c]ustom has fixed a maximum of occupation for each [elected] office" in the United States); Mark Petracca, *Rotation in Office: The History of an Idea*, in Limiting Legislative Terms 19 (Gerald Benjamin & Michael Malbin eds., 1992); Nelson Polsby, *The Institutionalization of the House of Representatives*, 62 Am. Pol. Sci. Rev. 144, 146 (1968) (describing congressional turnover during 19th century).

case, the choice of the present electorate will affect the choices available to future electorates.

The issue in this case is whether Amendment 73 limits future electorates' choices *more* than the status quo absent Amendment 73. Nothing in the record of this case indicates that Amendment 73 so limits voter choice. Therefore, this Court cannot strike down Amendment 73 on the ground that it imposes the views of a present majority of Arkansas voters on future electorates.

B. The U.S. Constitution permits the people of Colorado to limit candidacy of incumbents in order to prevent government-conferred political advantage from reducing competition in elections.

The people of Arkansas are permitted to curb the advantage enjoyed by incumbents in order to prevent incumbents from drowning out other political voices. Such restriction of incumbent political activity is permissible because the advantages of incumbency are, in part, the creation of government. This Court has long held that state and federal law may restrict candidacy and political activity in order to curb the advantage that political actors may obtain from government-conferred benefits. Where political advantage "ha[s] little or no correlation to the public's support for the [advantaged entity's] political ideas," but rather is the result of state-conferred benefits, then the Supreme Court has upheld state restrictions on political activity. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-660 (1990). In effect, such regulation redresses an imbalance of power itself created by government regulation or subsidy: it simply restores the status quo that would exist absent a distortion in the political marketplace caused by government intervention favoring one political interest over others.

Invoking the principle that government may mitigate institutional advantage that government creates, this Court

has upheld exclusions of potential candidates from political activity far more far-reaching and restrictive than Amendment 73. In *United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), for instance, this Court upheld the constitutionality of the "Hatch Act," a statute that prohibits federal employees from taking "an active part in political management or political campaigns," *Letter Carriers*, 413 U.S. at 550, which the statute's implementing regulations construed to include " '[b]ecoming a partisan candidate for, or campaigning for, an elective office.' " *Id.* at 578 n.21 (quoting 5 C.F.R. § 733.122(b)(6)).

In affirming this statute, this Court noted that the statute served a compelling interest in preventing incumbent parties from entrenching themselves in office with the aid of government employees. According to this Court,

> Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against a party in power . . . using the thousands . . . of federal employees, paid for at public expense, to man its political structure and political campaigns.

Letter Carriers, 413 U.S. at 565-66. Therefore, the Court upheld a statute that prevented federal employees from running for any political office whatsoever.

By contrast with the Hatch Act, Amendment 73 is an extremely limited restriction on the number of candidates that can be presented to the voters for consideration. Amendment 73 bars a very small class of federal employees (incumbent representatives who have served three terms or senators who have served two terms) from being placed on

the ballot for re-election to the positions that they currently hold. Amendment 73 allows the affected class of candidates to run for any other office. By any measure, Amendment 73 is a less draconian restriction on the choice of candidates presented to the electorate than the Hatch Act upheld in *Letter Carriers* and should be upheld for similar reasons.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the Arkansas Supreme Court.

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